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ABSTRACT

This pamphlet discusses the legal protections for employees with psychiatric disabilities, and analyzes the decisions of federal and state courts in cases where employees who claimed a psychiatric disorder challenged an employment decision under the Americans with Disabilities Act of 1990 (ADA), the Rehabilitation Act of 1973, or state law. It suggests ways in which college administrators can accommodate this category of disabilities, and the limits of the college's accommodation process. Section headings include: "What Does the Law Require?"; "What Is a Psychiatric Disability?"; "The Accommodation Process" (which defines who is "disabled," and ability to perform, and discusses the possibility of, reasonableness of, and extent of accommodation); "Workplace Issues Related to Psychiatric Disorders" (attendance and schedule adjustments, performance, workplace misconduct, and off-work misconduct); "How Does an Employee Pursue Claims Under the ADA?"; "Suggestions for Dealing with Faculty with Disabilities"; and "Suggestions for Dealing with Staff with Psychiatric Disabilities". Appended are sections titled "Potential Symptoms of Mental Illness in the Work Place"; "Descriptions of Prevalent Mental Illness" (anxiety disorders, phobias, panic disorder, obsessive-compulsive disorder; post-traumatic stress disorder, depressive disorders, major depression, manic-depressive illness/bipolar disorder, dysthymia, and seasonal affective disorder); and "Schizophrenia". (Contains 24 References.) (BF)

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THE PUBLICATION SERIES

Accommodating Faculty and Staff with Psychiatric Disabilities

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Accommodating Faculty and Staff with Psychiatric Disabilities

Some experts estimate that nearly one in two individuals in the United States has experienced or will experience a mental disorder at some point in their life.[1] College and university employees are not immune from mental disorders; even a relatively small college may find it necessary to deal with a staff or faculty member who suffers from a psychiatric disorder.

When an employee is diagnosed with a psychiatric disorder, both the employee and the college face many challenges. The employee may fear that he or she will be stigmatized and that a job or a career will be lost. The college's administrators may worry about whether the employee will have attendance problems or even whether the employee's behavior will be appropriate. Co-workers or supervisors may fear that the employee will be violent, although research shows that individuals with psychiatric disorders are no more violent than the general population.[2]

This pamphlet will discuss the legal protections for employees with psychiatric disabilities, and will analyze the decisions of federal and state courts in cases where employees who claimed a psychiatric disorder challenged an employment decision under the ADA, the Rehabilitation Act, or state law.[3] It will also suggest how college administrators can approach the accommodation process for this category of disabilities, and the limits of the college's accommodation requirement. Finally, a checklist of suggestions for working with faculty and staff with psychiatric disabilities is included. This pamphlet will not cover physical access to the workplace, the application of the ADA to individuals who abuse drugs or alcohol, or issues unrelated to employment.

What Does the Law Require?

Faculty and staff with psychiatric disabilities are protected from discrimination on the basis of their disability by two federal laws, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973. State fair employment practice laws also prohibit this type of discrimination. As recipients of federal financial assistance, most colleges and universities should be acquainted with the issues of disability in the workplace. The Rehabilitation Act of 1973, 29 U.S.C. §701, *et seq.*, prohibits discrimination on the basis of disability in any program or activity receiving financial assistance from the federal government. The statute prohibits discrimination against an "otherwise qualified individual" with a disability "solely by reason of her or his handicap."

1. Daniel Golman, "1 in 1 Found to Suffer Mental Disorder," *New York Times*, January 14, 1994, A-20.

2. John W. Parry, "Mental Disabilities Under the ADA: A Difficult Path to Follow," 17 *Mental and Physical Disability Law Reporter* 100 (1993).

3. A LEXIS search identified only a few opinions involving college faculty or staff with psychiatric disorders; therefore, opinions involving employees in nonacademic organizations are also analyzed.

Commonly (and hereafter) referred to as §504 (29 U.S.C. §794), it broadly defines the term disability, including "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 45 C.F.R. §84.3(j) (1995). A person in one of the above categories, with "any mental or psychological disorder, such as ... emotional or mental illness" is protected by §504.

This statute served as the foundation for the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101, *et. seq.* The analytical elements for reviewing a claim of disability discrimination are the same under both §504 and the ADA. Indeed, most of the judicial decisions addressing psychiatric disabilities have arisen in §504 litigation.

The ADA extended §504's prohibitions against discrimination on the basis of disability to employers generally. Specifically, Title I of the ADA prohibits discrimination in employment "against a qualified individual with a disability because of the disability." Discrimination includes the failure to make "reasonable accommodations" for the otherwise qualified person unless the accommodation creates "an undue hardship." 29 U.S.C. §12112. Any employer, public or private, with fifteen (15) or more employees is subject to the ADA. The ADA's definition of disability mirrors §504's. 29 C.F.R. §1630.2.

An initial analysis of coverage requires a determination of whether the claimed impairment "substantially limits one or more" of the person's "major life activities," defined to include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." *Id.* "Substantially limits" means an inability to perform a "major life activity that the average person in the general population can perform" or a significant restriction on one's ability to perform a major life activity. *Id.* The nature and severity of the impairment, its duration and its permanent or long term impact are all factors to be considered in determining whether a substantial limitation exists. *Id.* A temporary disability is excluded from the ADA's scope. 29 C.F.R. §1630.2(j); see also *Evans v. City of Dallas*, 861 F. 2d 846, 852-53 (5th Cir. 1988).

A qualified individual with a disability is a person "who, with or without reasonable accommodation, can perform the essential functions of [the] position." 29 C.F.R. §1630.2(m). Appropriate consideration shall be given to the employer's determination of just what are the essential functions of a job as outlined in a written job description. 29 C.F.R. §1630.2(n).

While the ADA excuses an employer from providing reasonable accommodation if it creates undue hardship, the law's definition of that term provides little practical guidance. See 29 C.F.R. §1630(p). "The overall financial resources" of the employer are a major factor in making such a determination, so it is doubtful that it will provide any relief to colleges in employment situations. However, if the employee (or prospective employee) poses a "direct threat" to others, or to him/herself, which "cannot be eliminated or reduced by reasonable accommodation," the individual is deemed unable to perform the essential functions of the job. 29 C.F.R. §1630.3(r).

What Is a Psychiatric Disability?

The ADA includes "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. §1630.2(h)(2). §504's definition is identical. 45 C.F.R. §84.3(j)(2). According to the Equal Employment Opportunity Commission's (EEOC) "Enforcement Guidance on the ADA and Psychiatric Disabilities," examples of mental disorders include bipolar disorder, major depression, anxiety disorders, obsessive compulsive disorder, posttraumatic stress disorder, schizophrenia, and personality disorders.[4] Specifically excluded from the ADA's definition of disability are a variety of conditions, some of which are considered psychiatric disorders.[5] The law also specifically excludes persons engaged in the illegal use of drugs, regardless of the reason for such use. 42 U.S.C. §12114. Alcoholism, on the other hand, is included as a psychiatric disorder,[6] and is protected by the law, although the ADA specifies that employers may discipline an employee for misconduct or unsatisfactory performance related to alcohol use (42 U.S.C. sec. 12114 (c)(4)). Failure to hire, or termination of, an employee because of his or her status as a current or former alcoholic, however, is a violation of the ADA (see, for example, *Ellwood v. Exxon*, 984 F. 2d 1270 (1st Cir. 1993))

Psychiatric disorders may (but do not necessarily always) result in behavior that interferes with an individual's ability to work, to care for himself or herself, to think or concentrate, or to interact appropriately with others. Many of these disorders are recurring, ongoing conditions, that may have periods of quiescence and periods that require intensive treatment and/or hospitalization. Because the same disorder may affect two individuals differently, and may even wax and wane for a single individual, the need for treatment, accommodation, and other forms of assistance may vary throughout that individual's life.[7]

In order to qualify for ADA protection, an employee must provide documentation that he or she has a psychiatric impairment diagnosed by a licensed mental health professional. Mental health professionals refer to the *Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition (DSM-IV)*, published by the American Psychiatric Association, using its criteria to determine which (if any) diagnosis to make. The DSM-IV defines a mental disorder as:

A clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (i.e., a painful symptom) or disability (i.e., impairment in one or more

4. EEOC *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*. EEOC Notice Number 915.002, March 25, 1997.

5. The law specifically excludes homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; psychoactive substance use disorders resulting from current illegal use of drugs. 42 U.S.C. §12211.

6. See, for example, *Clouves v. Terminex International*, 109 N.J. 575 (1988).

7. Deborah Zuckerman, Kathleen Debenham, and Kenneth Moore. *The ADA and People with Mental Illness: A Resource Manual for Employers*. Washington, DC: American Bar Association and National Mental Health Association, 1993, p. 7.

important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom."

The *DSM-IV* places psychiatric disorders into four categories: 1) clinical disorders (including schizophrenia and other psychotic disorders, mood disorders such as major depression and bipolar disorder, anxiety disorders, and eating disorders, among others); 2) personality disorders and mental retardation (such as paranoia, or schizoid, borderline, antisocial and narcissistic personality disorders); 3) general medical conditions, and 4) psychosocial and environmental problems (such as stress disorders). An assessment is done by a licensed clinician to determine the severity of the individual's symptoms and his/her ability to function at work and socially.

The process for determining the applicability of the ADA or §504 is the same for claims of mental disability as it is for physical disorders. Thus, it is possible that the same psychiatric condition may be a disability in one context but not in another. Much depends on the nature of the disability, the type of job the individual has or seeks, the effect of the disability on the individual's ability to perform the job, and the nature of the accommodation.

The Accommodation Process

The ADA requires the employer to accommodate only those disabilities of which it is aware, after determining whether the individual is in fact protected by the ADA. Given the stigma that our society attaches to mental illness, a faculty or staff member with a psychiatric disorder faces an extremely difficult choice: if he or she does not disclose the condition, the college has no legal obligations to accommodate. If he or she does decide to disclose the condition, discrimination or other inappropriate treatment may occur."

Because of this dilemma, and because of the reluctance of some to seek treatment for their disorders, there are inevitably some faculty or staff at every college who have successfully concealed a psychiatric disorder and who are functioning without accommodation. Supervisors, however, should resist "diagnosing" employees with misconduct or performance problems as suffering from a psychiatric impairment, and instead should document the problem behavior and discuss it with the employee. The college must consider accommodating an employee who has disclosed a psychiatric disorder. In approaching the accommodation of an employee who has disclosed a psychiatric disorder, the following elements of the law must be satisfied:

1. Is the faculty or staff member "disabled" under the law's definition? Not all psychiatric conditions meet the definition of disability, as defined by the ADA or Section 504 *(see page 2)*. The employer, however, is entitled to request documentation of the condition and, under certain

8. American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders*, 4th Edition. Washington, DC: APA, p. xxi.

9. Laura Mancuso, *Case Studies on Reasonable Accommodations for Workers with Psychiatric Disabilities*. Sacramento: California Dept. of Mental Health, 1993.

circumstances, to ask the employee to undergo an examination by an expert to determine the nature of the condition and any limitations on the employee's ability to perform the job that are related to the condition.

Supervisors and managers should take the following precautions if they have decided it is appropriate to refer an employee for a psychiatric examination:[10]

a. There should be some triggering behavior or performance problem such that the college needs to determine whether the employee is fit for duty.

b. The examination must be limited to two issues: 1) whether the employee can perform the duties of the job with or without accommodation; and 2) whether the employee can do the job without creating a "direct threat" to the employee's or another's health or safety.

c. If the examination determines that the employee is fit for duty but needs some form of accommodation, the employer must follow the process outlined in the ADA and its regulations for determining whether an accommodation is reasonable or poses an undue hardship.

d. All documentation of the psychiatric examination must be kept confidential; supervisors, managers, co-workers, or union officials are not entitled to review the information without the consent of the employee.[11]

The medical or psychiatric examination must be closely related to the requirements of the position. Employers should provide the medical expert with a copy of the job description with the essential functions clearly indicated.

Even if the employee presents a diagnosis from a medical expert that indicates a potentially disabling condition, the condition may not always satisfy the requirements of the law. For example, in *Gaul v. AT&T, Inc.*, 955 F. Supp. 346 (D.N.J. 1997), an employee who was diagnosed with stress disorders and major depression claimed that his employer was required to provide a stress-free work environment as an accommodation. The court characterized his work difficulties as caused by his inability to get along with a particular co-worker, rather than his stress disorders, and said that job-related pressures or workplace frictions are not disabilities. In *Boldt v. Wisconsin LIRC*, 2 ADA Cases 554 (Wisc. Ct. App. 1992), a night watchman with depression was discharged for making harassing telephone calls from work. Although the employer knew that the worker had marital problems, it did not know of the depression. The court found that "fighting with one's wife is not a mental illness," and therefore, the reason for his discharge was not a disability. Similarly, personality traits such as poor judgment or poor impulse control are not disabilities, according to the court in *Daley v. Koch*, 892 F.2d 212 (2d Cir. 1989).

In order to qualify as a disability under the ADA, the disorder must "substantially limit" the employee in his or her performance of a wide range

10. The authors acknowledge with thanks the assistance of Thomas Flygare in preparing these guidelines.

11. In fact, the *Guidance*, supra note 5, provides that an employer may not disclose to other employees any medical information about a disabled co-worker or that the employer is providing a reasonable accommodation (which would indicate a disabling condition). An employer may advise other co-workers that there is a legitimate business reason in compliance with federal law for any job changes. Response to *Guidance* question #16.

of jobs. For example, individuals with back disorders, carpal tunnel syndrome, and even diabetes have been unable to convince some federal courts that their disorder left them "substantially limited" because they did not demonstrate that they were disqualified from a wide range of jobs. See, for example, *Matthews v. TCI of Illinois*, 1996 U.S. Dist. LEXIS 8274 (N.D. Ill. 1996) (back disorder), *Taylor v. Albertsons*, 886 F. Supp. 819 (W.D. Okla. 1995) (carpal tunnel syndrome), and *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437 (W.D. Wisc. 1996) (diabetes). Furthermore, the disability must interfere with the employee's ability to do the job, not his or her ability to get to work. For example, in *Schwartz v. Northwest Iowa Community College*, 881 F. Supp. 1323 (N.D. Iowa 1995), a library clerk with night blindness was unable to demonstrate that she was substantially limited by her condition because it did not interfere with her ability to *do* her work, but only with her ability to drive at night to get to her night-shift job. The EEOC *Enforcement Guidance* on the application of the ADA to psychiatric disorders states that impairments that last only a brief time are not substantially limiting, but conditions that are episodic or that have a high likelihood of recurrence may be substantially limiting. Serious problems in getting along with co-workers (compared with simple unfriendliness) might be an example of a substantial limitation if it were linked to a psychiatric disorder, according to the *Guidance*, although distinguishing between the two conditions may not be simple for an employer. Furthermore, if an individual's ability to concentrate or to sleep are substantially limited because of a psychiatric disorder, the ADA's protections may be triggered.

2. Is the faculty or staff member qualified – can he or she perform the essential functions of the position?[12] In cases involving workers with disability-related attendance or performance problems, the courts, in most instances, have ruled that individuals who are repeatedly absent, or who cannot perform the essential functions of their job, are not qualified. It should be noted, however, that the definition of "qualified" includes an individual who "with or without reasonable accommodation, can perform the essential functions" of the position. Therefore, the institution must determine if a reasonable accommodation would in fact enable the individual to perform those functions.

Institutions that have developed job descriptions for staff, and that have articulated performance expectations for faculty, can then compare the medical or psychiatric information about the individual's abilities and limitations with the essential functions of the position. Does the individual's condition limit his or her ability to deal with others? to tolerate stress? to perform complex tasks or multiple tasks simultaneously? Is the individual's memory affected, and is this relevant to the position? The answers to these questions may differ for faculty positions, and among staff positions. For example, speaking in public may be difficult for individuals with certain psychiatric disorders. This may be an essential function for a faculty mem-

12. See EEOC *Enforcement Guidance on the Effect of Representations Made in Application for Benefits on the Determination of Whether a Person is a "Qualified Individual with a Disability" under the ADA*, EEOC Notice Number 915.002, February 12, 1997.

ber, but not for a secretary or a maintenance worker. Operating in a stressful environment may be essential to the position of a financial aid officer but not for a groundskeeper.

In a case involving a faculty member accused of sexually harassing and assaulting students and colleagues, the faculty member asserted that his psychological disorder caused "disinhibition," and requested an accommodation that would remove him from contact with students and colleagues (*Motzkin v. Trustees of Boston University*, 938 F. Supp. 983 (D. Mass. 1996)). In awarding summary judgment for the university, the court stated that teaching is an essential function of a faculty member's job, and "there is no place in a university community for someone who is as incapable of controlling his impulses as Motzkin insists he is" (938 F. Supp. at 994).

Supervisors and administrators have fairly wide latitude to design jobs to meet the institution's needs, as long as the job's design is not manipulated so that a disabled individual cannot perform it. Written job descriptions and policy documents are important and very helpful for institutions, both as one component of a rational employment relations system, and as evidence of compliance with the nondiscrimination laws.

3. Is an accommodation possible? When analyzing whether someone with a psychiatric disability can be accommodated, the supervisor or administrator must take into consideration the nature of the condition, the requirements of the job, and the limitations the condition imposes upon the employee's ability to do the job. The accommodations most often requested by individuals with psychiatric disorders are a flexible work schedule, additional leave time for treatment or counseling, a quiet work location to minimize distractions, reassignment of certain job duties, or a self-paced timetable for work.[13]

For certain jobs, an employee may ask to work at home all or part of the work time. Courts have differed on whether an employer must accede to these requests, depending on the nature of the job and the burden that such an accommodation places on the employer. (See, for example, *Van de Zande v. State of Wisconsin Dept. of Administration*, 44 F.3d 538 (7th Cir. 1995), where the court rejected the plaintiff's contention that, since working at home was the only accommodation that would permit her to keep her job, the employer was legally required to provide it.) Of course, if the institution allows some workers to take extended leave, to self-schedule, or to telecommute, then it may need to consider similar accommodations for a disabled worker, again depending on the nature of the job and the effect of the accommodation on the institution.

During any discussion about appropriate accommodations, supervisors or administrators should discuss with the individual all of the possible options provided that the accommodations under consideration are related to the limitations that flow from the disabling condition.[14] Although the

13. Deborah Zuckerman, "Reasonable Accommodations for People with Mental Illness under the ADA," 17 *Mental and Physical Disability Law Reporter* 311 (1993); see also Jacqueline Parrish, "Reasonable Accommodations for People with Psychiatric Disabilities," 8 *Community Support Network News* 8 (1991).

14. The regulations interpreting the ADA specify that the employer should "... (2) consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's

employer is not required to select the best accommodation or even the one most preferred by the employee, in most instances the employee understands his or her condition and its limitations, and can propose accommodations that may be less costly or difficult than accommodations the employer had otherwise considered.

4. Is the accommodation reasonable? The employer's obligation to accommodate a disabled worker is limited by the concept of "undue hardship," defined as "significant difficulty or expense." Accommodations that are disruptive to an institution's ability to deliver instructional services to students or to perform its other functions would probably not be viewed as reasonable by a court. For example, in *Hogarth v. Thornburgh*, 833 F. Supp. 1077 (S.D.N.Y. 1993), an FBI clerk with bipolar disorder, who handled top secret documents, was discharged after several psychotic episodes. The court ruled that the employer was not required to change the employee's job by removing essential functions (prescreening documents and removing those that were top secret) or to monitor his medication; both were considered to be undue hardships. Similarly, in *Fields v. Lyng*, 705 F. Supp. 1134 (D. Md. 1988), *aff'd without opinion*, 888 F.2d 1385 (4th Cir. 1989), a labor relations specialist for the Department of Agriculture with borderline personality disorder was arrested for shoplifting during business trips. He requested an accommodation that would exempt him from out-of-town travel. The court ruled that he was really requesting a new position, which was not required by the law.

Accommodations that would not reduce the danger of a "direct threat" by a disabled worker are also considered by the courts to be an undue hardship. When an employee with a psychiatric disorder engaged in misconduct, either at work or elsewhere, several courts determined that the employee's behavior was uncontrollable, and thus the worker posed a direct threat to coworkers or supervisors (see, for example, *Adams v. Alderson*, 723 F. Supp. 1531 (D.D.C. 1989); see also *Mazzarella v. USPS*, 849 F. Supp. 89 (D. Mass. 1994)).[15]

5. What if the accommodation fails? Not all accommodations are successful, and the employer's duty to accommodate does not necessarily end with the first accommodation attempt. If an accommodation is unsuccessful, the supervisor or administrator must determine whether the problem is with the accommodation or with the faculty or staff member. If the performance or conduct problem is unrelated to the disability, then the institution may proceed with disciplinary action. If the problem is related to an inadequate accommodation, then the employer must again perform the "accommodation analysis" described above.

disability and how those limitations could be overcome with a reasonable accommodation, (3) in consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and (4) consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer. 29 C.F.R. sec. 1630.9 *(Interpretive Guidance)*.

15. But see the discussion in the *Guidance*, supra note 5, of treatment of an employee who has attempted suicide, in which the EEOC takes the position that an employer can not, in most circumstances, assume that an individual who has attempted suicide poses a direct threat when he or she seeks to return to work.

Individuals with alcoholism, for example, or a history of drug addiction may relapse and, therefore, one leave of absence for treatment may not end the addiction. Similarly, individuals with some forms of bipolar disorder or schizophrenia may need in-patient treatment more than once because of the episodic nature of their illness. Although the law does not require an infinite number of different accommodations, the supervisor or administrator should perform the analysis as to whether a different accommodation will enable the individual to perform the job's essential functions, and whether such an accommodation is reasonable.

Workplace Issues Related to Psychiatric Disorders

Employees with psychiatric disorders are no more alike than are employees without such disorders. They may be conscientious workers or not, task-oriented or not, highly motivated or not. They may also differ in their adaptation to their illness, their response to medication, and other characteristics. Therefore, it is important for supervisors and administrators to remember to deal with the person as an *individual*, not as a "label."

For some workers, however, the psychiatric condition may manifest itself in performance or disciplinary problems. The ADA makes it clear that the employee must be able to perform the essential functions of the position he or she holds or desires, and further provides that, even if the worker's performance or conduct is affected negatively as a result of alcohol or drug abuse, the employer may hold the employee to the same performance and conduct standards required of other employees (42 U.S.C. sec. 12113(c)(4)). But if the employee discloses that he or she has a diagnosed psychiatric disorder, it is the responsibility of the supervisor or administrator to determine, in conjunction with medical experts, whether a reasonable accommodation would enable that individual to meet the institution's performance or conduct standards and to perform the essential functions of the job.

Attendance and schedule adjustments. Overall, employees with disabilities have attendance rates that are as good or better than workers without disabilities.[16] Sometimes, however, faculty or staff with psychiatric disorders may have difficulty getting to work on time, or getting to work at all, as a result, perhaps, of medication they may be taking, or because short-term or long-term in-patient treatment is sometimes necessary for certain disorders.

Depending on the position, prompt and regular attendance may be an essential function. Certainly for faculty who teach, missing classes or arriving late can disrupt the institution's ability to deliver instruction. Absence from department meetings, advising sessions with students, or other faculty responsibilities can also be problematic. Of course, the institution would have to enforce consistently the requirement that *all* faculty attend class promptly and perform their other responsibilities regularly before it could discipline a faculty member with a psychiatric disorder for missing class or

16. Barbara A. Lee and Karen Newman, "Employer Responses to Disability: Preliminary Evidence and a Research Agenda," 8 *Employee Responsibilities and Rights Journal* 209 (1995).

for neglecting other responsibilities. Most staff positions also require regular attendance, particularly those involving the processing of time-sensitive documents or information, those involving public contact, and those involving public safety.

Federal courts interpreting the Rehabilitation Act typically have upheld discipline, transfer, or discharge of employees whose absences were viewed as excessive. For example, in *Walders v. Garrett*, 765 F. Supp. 303 (E.D. Va. 1991), *aff'd without opinion*, 956 F.2d 1163 (4th Cir. 1992), the court upheld the discharge of a document processor with excessive absences, saying "it is self-evident that, while perfect attendance is not a necessary element of all jobs, reasonably regular and predictable attendance is necessary for many" (p. 309). In *Guice-Mills v. Derwinski*, 967 F.2d 794 (2d Cir. 1992), a hospital demoted a head nurse diagnosed with depression, who could not get up for her 8:00 a.m. shift. The nurse rejected both the demotion and the flexible schedule; the court, however, believed that the hospital's action was reasonable because it needed a management representative on duty at the beginning of the shift.

Although a flexible schedule is often the accommodation that workers with a wide variety of disabilities, including psychiatric disorders, prefer, the employer may not be required to accede to this preference. In *Carr v. Reno*, 23 F.3d 525 (D.C. Cir. 1994), a coding clerk at the U.S. Attorney's office requested a flexible schedule because commuting at rush hour exacerbated her symptoms. The court, noting that the coding had to be completed by 4:00 p.m. every day, rejected the claim, saying that "to require an employer to accept an open-ended 'work when able' schedule for a time-sensitive job would stretch 'reasonable accommodation' to absurd proportions" (p. 530).

On the other hand, a staff member may request that the institution hire a temporary replacement for those times when he or she cannot attend work. Depending on the position and the cost of the temporary replacement, this may be a reasonable accommodation. But the courts have been reluctant to require a temporary replacement for a worker with poor attendance. In *Matzo v. Postmaster General*, 685 F. Supp. 260 (D.D.C. 1987), *aff'd without opinion*, 861 F.2d 1290 (D.C. Cir. 1988), the court rejected the claim of a legal secretary with "emotional problems" that her discharge was unlawful. Punctual attendance, according to the court, was an essential function of her job, and hiring a temporary secretary to fill in during her absences was an undue hardship for the employer. Even if an employee's work performance is outstanding, he or she has usually been unable to prevail if the disability precludes regular attendance. In *Leatherwood v. Houston Post Co.*, 59 F.3d 533 (5th Cir. 1995), a writer and editor whose performance was acceptable while he was at work was discharged for missing nearly four months of work over a nine-month period due to hospitalization for manic-depressive illness. The court ruled that, as a matter of law, he was not qualified because his performance was impaired by his long absences during his psychotic periods.

Despite what appears to be overwhelming success for defendants in attendance cases, the institution must be able to show that it considered

potential accommodations and the reasons for rejecting them. For example, in *Johnson v Sullivan*, 824 F. Supp. 1146 (D. Md. 1991), an employer who refused to allow a worker with a sleep disorder to work a flexible schedule simply because it was "contrary to policy" did not prevail. Unless the employer can demonstrate why the policy is essential to the efficient operation of the business, courts will very likely rule that the employer has violated the ADA because it did not perform the analysis of whether an accommodation was possible, and whether it posed an undue hardship.

Adding regular attendance and promptness as essential functions of the position in a written job description would help to avoid protracted litigation, and would certainly put the staff member on notice that the institution is serious about attendance. Committing it to writing will also be useful if the institution is later required to defend a discharge decision in court.

Performance. There need to be clear performance standards before an institution can successfully defend a claim of disability discrimination, based upon the performance of a faculty or staff member. Developing such standards may be simpler for staff positions than for faculty. Both quantitative and qualitative criteria can be developed for staff jobs, and, of course, as with any performance issue, regular assessment and documentation of performance are essential to the successful defense of any employment lawsuit in which performance is an issue.

Performance standards are often less clear for faculty members. Although colleges or universities may tolerate a wide range of classroom behavior and approaches to teaching, they are still the ultimate judge of what behaviors and teaching approaches are appropriate (see, for example, *Hetrick v. Martin*, 480 F.2d 705 (6th Cir. 1973)). Faculty members who are disruptive, who neglect their professional responsibilities, or who harass students or their colleagues can be disciplined or discharged, particularly if the institution has developed clear policies against such misconduct and has communicated those policies to faculty in a handbook or other policy document. For examples of institutions that were successful in discharging or disciplining tenured faculty for disruptive or unprofessional conduct, see *King v. University of Minnesota*, 774 F. 2d 224 (8th Cir. 1985), *Potemra v. Ping*, 462 F. Supp. 328 (E.D. Ohio 1978), and *Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995).

As noted above, the ADA only protects those workers with disabilities who can perform the essential functions of the position with or without accommodation. Therefore, the outcomes of cases often turn on whether the worker's performance was acceptable, or whether a reasonable accommodation would permit the worker to maintain an acceptable level of performance. For example, in *Larkins v. Ciba Vision Corp.*, 858 F. Supp. 1572 (N.D. Ga. 1994), an employee with panic attacks could not talk with customers on the telephone, an essential function of her customer service position. The court ruled that the employee was not "qualified" to perform the job's essential functions; therefore, she was not protected by the ADA, and the employer was not required to accommodate her. And in *Hill v. State of Fla. Dept. of Health*, 2 A.D. Cases 177 (M.D. Fla. 1992), a public assis-

tance worker with depressive disorder was found to be unqualified, and thus, unprotected by the ADA because she could not complete all her work nor could she perform the portion of her job that required public contact. In *Carrozza v. Howard County*, 45 F.3d 425, 1995 U.S. App. LEXIS 387 (4th Cir. 1995) (unpublished), a typist with bipolar disorder had difficulty learning the WordPerfect software program. Despite the additional time and training that she was given over a 13-month period, her performance was "never close to acceptable," according to the court. The employer's extra efforts on the plaintiff's behalf, and its offer to transfer her to another facility, more than met the requirements of the ADA, according to the appellate court.[17] And in *Voytek v. Univ. of California and Regents of Univ. of Calif.*, 1994 U.S. Dist. LEXIS 12453 (N.D. Calif. 1994), *affirmed*, 1996 U.S. App. LEXIS 3531 (9th Cir. 1996), the associate director of environmental health and safety, who had depressive disorder, requested several accommodations, which were granted. He no longer was required to work nights or weekends, was allowed to stop working when he was tired, was not given new responsibilities, and had no deadline pressure. Despite these accommodations, his supervisor still rated his performance as unacceptable. The University offered him alternate positions, which he refused. Because he could not perform his job, the court found him to be unqualified.

In order to be protected by the ADA, it must be the psychiatric disorder, and not any other deficiency, that limits the staff member's ability to perform the essential functions of the job. In *Baxter v. Wisc. Dept. of Natural Resources*, 477 N.W. 2d 648 (Wisc. App. 1991), for example, the court found that a clerical employee's severe depression was unrelated to her slow typing speed. Since she was discharged as a result of the latter rather than the former, the employer was not required to provide a reasonable accommodation by lowering its performance standards.

In some instances, employees with performance problems wait until they are close to discharge, or have actually been discharged, before they disclose a psychiatric disorder to the employer. The courts, however, have generally been uniform in their rejection of such disability discrimination claims, stating that, since the employer had not been advised previously of the disability, the dismissal does not violate the ADA. For example, in *McIntyre v. Kroger Co.*, 863 F. Supp. 355 (N.D. Tex. 1994), a grocery manager with depression was disciplined, then finally discharged, for poor performance. The court upheld the discharge based on a lack of notice of the disability to the employer. Similarly, in *Landefeld v. Marion General Hospital*, 994 F.2d 1178 (6th Cir. 1993), a doctor with bipolar disorder stole mail from other doctors' mailboxes. The Board of Directors withdrew his hospital privileges without being aware of his disability. Because of this lack of knowledge, said the court, there was no ADA violation.

Workplace misconduct. In some cases, faculty or staff with psychiatric disorders may have difficulty dealing with stress or dealing with their coworkers or with students. Particularly for positions that require public

17. Adjusting supervisory methods and even providing a temporary job coach to assist a qualified employee as part of job training are reasonable accommodations cited by the EEOC in its *Guidance*, supra note 5.

contact (arguably, all faculty positions and most staff positions), administrators and supervisors should consider adding behavioral requirements as essential functions of the position. Although many faculty members do not have "job descriptions" *per se*, many institutions have adopted the American Association of University Professors' "Statement on Professional Ethics," which requires faculty to "demonstrate respect for students" and prohibits discrimination against or harassment of their faculty colleagues (AAUP 1990, p. 76). Institutions with faculty or staff handbooks should consider adding language that requires all employees of the institution to treat their fellow employees, students, and the institution's guests with civility, and to refrain from actions that disrupt the efficient functioning of the college or university.[18]

In most circumstances, the courts have upheld an employer's discipline or discharge of an employee who is disruptive, abusive, or dangerous, whether or not the conduct is related to a psychiatric disorder. Several cases have analyzed the employer's responsibility when an employee with a low tolerance for stress or criticism has difficulty getting along with a supervisor or with fellow workers. In *Allen v. Stone*, 1992 U.S. Dist. LEXIS 1008 (D.D.C. 1992), for example, a hospital nursing supervisor with a personality disorder was rude and disruptive, claiming that higher-level supervisors harassed her. She was eventually transferred to a nonsupervisory position, and then terminated. The court found the termination warranted because the employer was not required to create a position that would be unsupervised. The court commented that "it would have been impossible to create a work environment in which the plaintiff would be immune from criticism, supervision, or authority, or to guarantee that her superiors would not impose constraints that she would not find unreasonable" (p. *9). And in *Mancini v. General Electric*, 820 F. Supp. 141 (D. Vt. 1993), the court upheld the discharge of a production worker who was insubordinate on several occasions, noting that the ability to follow orders was an essential function of his job.

Even if the supervisor's unprofessional or abusive behavior causes the subordinate's emotional problems, the courts have been reluctant to find liability under the ADA. In *Weiler v. Household Finance Corp.*, 1995 U.S. Dist. LEXIS 10566 (N.D. Ill. 1995), a senior accounting clerk developed temporal mandibular joint dysfunction (TMJ) as a result of job-related stress (criticism, negative comments, and harassment by her supervisor). The supervisor's inappropriate conduct continued even after he was informed of the clerk's TMJ. The clerk became anxious and depressed, particularly as a result of her year-end performance evaluation, which was done by the supervisor in the cafeteria within earshot of other employees. The company placed the clerk on short-term disability, and, after a doctor

18. Private institutions can create contractual standards of conduct, and can discipline or discharge faculty or staff for violations of these standards of conduct. Public institutions have considerable leeway to limit disruptive conduct and speech, particularly in the wake of the decision by the U.S. Supreme Court in *Waters v. Churchill*, 114 S. Ct. 1878 (1994), which expanded the ability of public employers to discipline employees for potentially disruptive speech. For analysis and application of *Waters* and its predecessors to faculty conduct and speech, see W. A. Kaplin and B. A. Lee, *The Law of Higher Education*, 3d ed., (San Francisco: Jossey-Bass, 1995) at 327-331.

determined that she could return to work, offered her several positions where she would not be required to report to the abusive supervisor. The clerk, however, argued that she was unable to work in any position at the company. The court disagreed, characterizing the situation as a "personality conflict" between the supervisor and the clerk. "Being unwilling or even unable to work with a particular individual simply is not the equivalent of being 'substantially limited' in the life activity of working" according to the court (p. *11). It determined that the plaintiff could have worked at an alternate position within that company or at another company.

Workplace violence is not excusable, even if it is the result of a psychiatric disorder. In *Adams v. Alderson*, 723 F. Supp. 1531 (D.D.C. 1989), a computer programmer with adjustment disorder assaulted his supervisor and destroyed office equipment. He asserted that a transfer to another supervisor would be a reasonable accommodation. The court disagreed, saying "an agency is entitled to assign personnel as the needs of its mission dictate. It is not obliged to indulge a propensity for violence – even if engendered by a 'handicapping' mental illness – to the point of transferring potential assailants and assailees solely to keep peace in the workplace" (p. 1532). And in a case of dubious comfort to employers, although the organization prevailed, a federal trial court ruled that a custodian with "explosive personality disorder" who tore his supervisor's office apart, threw a chair and typewriter, and screamed obscenities did not have to be accommodated. The court ruled that the supervisor did not incite the outburst because she was "rude and hostile" to *all* of her subordinates. Furthermore, the discharge was reasonable because "it is not reasonable ... to expect the [employer] to juggle personnel so as to entirely remove the possibility that a supervisor may offend a particular employee" (*Mazzarella v. USPS*, 3 Amer. Disab. Cases 232, 227 (E.D. Pa. 1994)).

Even if the employee engages in disruptive conduct, the ADA requires the employer to consider whether an accommodation is reasonable, whether it will permit the worker to perform the essential functions of the job, and whether it will reduce any threat to the safety of the worker or of others. For example, in *Hindman v. GTE Data Services*, 3 A.D. Cases 641 (M.D. Fla. 1994), the company's motion for summary judgment was denied because the company had not performed the accommodation analysis for a worker who brought a firearm to work. The court criticized the company for ignoring the worker's request for a medical leave of absence and for refusing to examine the information he had submitted about his "chemical imbalance." "They simply rushed to judgment," said the court, without considering whether accommodating the worker with a medical leave would be reasonable. (At trial, the company ultimately prevailed, but it had to undergo the inconvenience and expense of a trial that might have been avoided if the company had simply performed the accommodation analysis and consulted a medical expert before it determined that it was inappropriate to accommodate the worker.)

The courts do not yet agree on whether an employee who is terminated for conduct related to a psychiatric disorder is terminated as a result of the conduct or of the disability. If the court determines it is the latter, then it

examines the job, the conduct, and the employer's accommodation attempts, all in an effort to determine whether the employee is "qualified" to perform the essential functions of the job. Because of this inconsistency among the courts, supervisors and administrators will need to document carefully the inappropriate behavior, its effect on the operations of the college or university, why an accommodation is not reasonable, and why the faculty or staff member is not qualified to perform the job.

Off-work misconduct. In unusual circumstances, a supervisor or administrator may wish to terminate a faculty or staff member for off-work misconduct. These issues occasionally arise when an individual is accused of criminal conduct (e.g., sale or use of controlled substances, assault, sex offenses) that occurs off-campus. In order to prevail, the college or university would need to demonstrate why that individual poses a risk of harm to others and how the institution will be negatively affected by continuing its relationship with the individual.

If a staff member's off-work misconduct has a direct relationship to his or her job (for example, a substance abuse counselor found guilty of selling or using controlled substances), the nexus between the conduct and the job may be relatively easy to establish and, therefore, the grounds for dismissal may be easier to establish. For example, in *Butler v. Thornburgh*, 900 F.2d 871 (5th Cir. 1990), an FBI agent with alcoholism committed assaults and damaged a government vehicle and the wall he hit. His discharge was upheld because the court found that he could not perform his work safely. Similarly, in *Wilber v. Brady*, 780 F. Supp. 837 (D.D.C. 1992), a criminal investigator for the Bureau of Alcohol, Tobacco, and Firearms was discharged for vehicular homicide and driving while impaired. The court upheld his discharge because it found his misconduct to disqualify him for his position.

Employees whose off-work misconduct has exposed others to danger have also not prevailed in their discrimination claims. For example, in *Richardson v. USPS*, 613 F. Supp. 1213 (D.D.C. 1985), a postal worker with alcoholism was suspended after his arrest for assault with intent to kill. And in *Franklin v. USPS*, 687 F. Supp. 1214 (S.D. Ohio 1988), the discharge of another postal worker was upheld because, as a result of his paranoid schizophrenia, he twice tried to gain forced entry to the governor's office, and then tried to enter the White House. The Postal Service had provided him with two leaves of absence for rehabilitation and the court ruled that these accommodations were reasonable and sufficient.

Although the courts have been sympathetic to employers' arguments that they cannot tolerate employees whose off-work conduct is dangerous or destructive, it is important that the institution be able to articulate *why*. Are students, faculty, or the public at risk? What evidence does the institution have to suggest this? What is the opinion of the psychiatric expert who has examined the employee? Did the institution seek a second opinion if the diagnoses or recommendations of the employee's psychiatrist differed from the institution's expert? What functions of the employee's job would be affected by this misconduct, particularly if it recurs?

The ADA permits an employer to refuse to accommodate a disabled employee who is a "direct threat" to the safety of others or to him or herself. Is the evidence of a direct threat based on sound medical judgment, or is it speculative? Is it based on this individual's own medical and performance history, or is it based upon stereotypes of the disability itself? Each determination must be made on the basis of the characteristics of the job, the characteristics of the individual and the disability. Careful, thorough attention to these issues is essential if a college or university wants to prevail in a challenge by an individual discharged for misconduct, whether or not it occurs at work.

How Does an Employee Pursue Claims Under the ADA?

Employees who wish to challenge their discipline or discharge under the ADA must first file a complaint with the federal Equal Employment Opportunity Commission (EEOC) within 180 days of the date of the alleged discriminatory act. They need to describe the discipline, the negative performance rating, the refusal to promote, or whatever employer action the faculty or staff member is challenging. If the employee has filed a claim with a state human rights agency under a state nondiscrimination law within the appropriate time period, he or she has 300 days to file a federal claim with the EEOC.

After a charge of discrimination has been pending before the EEOC for 180 days, the employee may request a "right to sue" letter from the agency. The employee then has 90 days to file suit in Federal District Court. Individuals who have filed charges generally do not wait for the EEOC to issue a finding in their cases; they instead prefer to get their complaints before the court. Suits often join tort claims as well as other claims of discrimination. Age discrimination claims may typically accompany a disability discrimination allegation.

Since the ADA incorporates Title VII's remedial provisions, litigation would go forward in a manner procedurally comparable to, for example, a sex discrimination claim. That means jury trials, attorney fee awards, compensatory damages (including awards for pain, suffering and other emotional damage) and punitive damages (subject to statutory limitations) are available to successful ADA litigants.

For colleges and universities whose faculty and/or staff are represented by a union, internal remedies (such as the use of a grievance system) cannot be denied to individuals who choose to pursue administrative or judicial remedies outside the institution (see, for example, *EEOC v. Board of Governors*, 957 F.2d 424 (7th Cir. 1992).

Suggestions for Dealing with Faculty with Disabilities

1. If your institution has a policy for dealing with faculty or staff with disabilities, consult that first. If your institution has no such policy, it should develop one immediately.

2. Make sure that workload policies and practices are clear and are followed consistently, documenting any deviations from standard practice (e.g., faculty given special projects, research leaves, etc).

3. Develop a policy, if none exists, on how the academic unit will handle tardiness, absences from class, etc. Will the department close ranks? What are the consequences for frequent or repeated tardiness or absences?

4. Respond immediately to student complaints of tardiness, absences, canceled classes, unprofessional behavior, or other disruptions to the academic program. Document all complaints, and observe the faculty member's class or monitor his/her promptness for and attendance at class.

5. If the institution does not have policies regarding faculty attendance and promptness, develop them.

6. Consider adopting, either intact or after modification, the AAUP "Statement on Professional Ethics."

7. Confront faculty whose performance is problematic for the department, particularly with respect to disruptive behavior or inappropriate conduct in class, noting the need to follow the institution's policies, seek medical or psychiatric assistance, or request a disability leave.

8. Consider what are the "essential functions" of a faculty member, and develop a policy or handbook provision that makes them explicit. Must all faculty conduct research and publish? Must they all perform service to the community, the institution, or the profession/discipline? May a faculty member "trade off" additional teaching for the right not to conduct research or engage in service?

9. Consider carefully any potential accommodations, whether requested by an employee or suggested by others, rather than dismissing them as unworkable or impractical. Document the analysis and give the reason(s) if you determine you cannot accommodate an employee. If the problem is disruptive behavior or absences, describe how the problem interferes with the college's ability to function. In particular, consider job restructuring or reassignment before taking adverse action against the employee.

10. If an employee's disability has resulted in behavior that could be dangerous, make sure that you obtain competent medical or psychiatric information before making an employment decision. Document the relationship between the disability's manifestations and the essential functions of the job.

11. When a faculty member has a psychological disability, you must separate the issues of misconduct from any potential academic freedom claims. Misconduct outside the classroom (violating rules or policies, committing criminal acts), scientific misconduct, or inappropriate behavior in the classroom are not protected by academic freedom.

12. Engage in supervisory training as you have for other issues.

13. Since a substantial number of mental disability claims have been filed with the EEOC alleging harassment on the part of coworkers or super-

visors, employers should adopt and enforce policies forbidding jokes or comments about the mentally ill just as they would prohibit any other type of harassment. More specifically, words like "crazy," "lunatic," "psycho," and "retard" should be forbidden.

14. Employers should examine the possibility of mandating use of mediation, or other alternative dispute resolution techniques, before (or in lieu of) resorting to the OCR, EEOC or litigation.

15. Ensure access to medical/psychological advice and obtain that guidance before making disability-related personnel decisions. Obtain legal advice when necessary.

16. Discuss, in a non-coercive manner, disability leave or retirement options with eligible employees.

Suggestions for Dealing with Staff with Psychiatric Disabilities

1. Make sure that job descriptions are accurate, up-to-date, and include regular attendance as an essential function (if you intend to enforce an attendance policy).

2. Consider adding behavioral information to job descriptions; for example, dealing with students in a courteous and positive manner, answering complaints promptly and in a professional manner, etc.

3. Consider adding that insubordination or disruptive behavior are grounds for discipline of staff.

4. Consider adding that maintaining confidentiality is an essential function of the position if a job requires access to sensitive information (student or staff academic or health records, payroll records, etc.).

5. Physical ability and physical fitness tests are not considered medical tests, and may be administered at a pre-offer stage.

6. Ensure that supervisors approach the accommodation process with an open mind; avoid subtle messages that only "bad" employees request accommodations.

Appendix*

POTENTIAL SYMPTOMS OF MENTAL ILLNESS IN THE WORK PLACE

Symptoms of mental illness generally present themselves in a person's behavior and personal habits, such as changes in mood, eating or sleeping habits, and personality. While a single symptom or isolated event is rarely a sign of mental illness, a symptom that occurs frequently, lasts for several weeks, or becomes a general pattern of an individual's behavior, may indicate the onset of a more serious mental health problem that requires treatment.

Some of the most significant indications of a possible mental illness include:

- marked personality change over time,
- confused thinking; strange or grandiose ideas,
- prolonged severe feelings of depression or apathy,
- feelings of extreme highs or lows,
- heightened anxieties, fears, anger or suspicion; blaming others,
- social withdrawal, diminished friendliness, increased self-centeredness,
- denial of obvious problems and a strong resistance to offers of help,
- dramatic, persistent changes in eating or sleeping habits,
- substance abuse,
- thinking or talking about suicide.

In reality, these symptoms are not always readily apparent. Employers and supervisors may, however, be able to notice significant changes in their employees' work habits, behaviors, performance, and attendance, such as:

- consistent late arrivals or frequent absences,
- low morale,
- lack of cooperation or a general inability to work with colleagues,
- decreased productivity,
- increased accidents or safety problems,
- frequent complaints of fatigue or unexplained pains,
- problems concentrating, making decisions, or remembering things,
- making excuses for missed deadlines, or poor work,
- decreased interest or involvement in one's work.

People who experience problems such as those listed above may simply be having a bad day or week, or may be working through a difficult time in their lives. A pattern that continues for a long period may, however, indicate an underlying mental health problem.

Although employers are not expected to diagnose or treat an employee's illness, they can play an important role in helping an employee recognize

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and deal with an existing performance problem. Employers will be most successful in this process if their discussion remains focused on job performance and on the need to find a way to regain the employee's previous quality of work. All performance problems must be related to the established performance standards for a particular job. If employees are not comfortable discussing their difficulties, deny the problem, or can not see a way to overcome the problem, the employer can then recommend consultation with an Employee Assistance Program (EAP) or physician.

DESCRIPTIONS OF PREVALENT MENTAL ILLNESSES

Among the adult population in the United States, diagnosable mental illnesses are quite common, occurring as frequently as hypertension/high blood pressure. In fact, according to statistics from the National Institute of Mental Health (NIMH), one out of every five people will experience a diagnosable mental illness in their lifetime. The three most prevalent illnesses are anxiety disorders, depressive disorders, and schizophrenia. As with other mental illnesses, the most common treatments include medication, psychotherapy or a combination of the two.

Anxiety Disorders

Anxiety disorders are the most prevalent form of mental illness. Estimates indicate that nearly 15% of adults in the U.S. will experience one of the anxiety disorders during their lifetimes. Anxiety disorders include phobias, panic disorder, obsessive-compulsive disorder, and post-traumatic stress disorder. A common element of all these disorders is severe fear or anxiety, usually associated with particular objects or situations. Because of the intense fear involved with such exposure, most people with anxiety disorders try to avoid the feared objects and situations.

Phobias

Phobia, the most common anxiety disorder, is an excessive fear of objects or situations. Exposure to the object or the necessity of entering a situation almost always provokes an immediate anxiety response with symptoms that may include sweating, feelings of panic, or difficulty breathing.

The three most common categories of phobias are *simple phobia*, *social phobia* and *agoraphobia*.

Simple phobia: The persistent fear of objects such as mice, snakes and insects, or the fear of particular situations such as heights, witnessing blood injuries, traveling by air, and closed spaces (claustrophobia).

Social phobia: A persistent fear of situations that expose a person to the possible judgment of other people, i.e., doing something or acting in a way that will be humiliating or embarrassing. Examples include the fear of choking on food while eating with other people, the fear of being unable to continue talking while giving a speech, and the fear of trembling hands while writing in the presence of others. Of all the phobias, social phobias pose the most direct problem for one's occupational functioning. An individ-

nal might worry that colleagues or a supervisor will detect signs of anxiety, which would increase the person's motivation to avoid the situation.

Agoraphobia: The fear of being in places from which escape might be difficult or embarrassing, or the fear of situations where help might not be available. Fear is compounded by concern about symptoms that may occur on exposure to the situation, such as dizziness, loss of bladder control, vomiting, or cardiac distress. Being outside of home alone, being in a crowd, or traveling in a train, bus, or car, are typical fears for those with agoraphobia.

Panic Disorder

More than 3 million people in the United States will develop panic disorder at some time in their lives (nearly 2% of adults). Panic disorder is different from any other type of anxiety because the panic attacks hit so suddenly and, initially, are almost always unexpected and unprovoked. Most people who have had one attack will experience numerous additional attacks over the duration of the disorder. Panic disorder may be limited to several weeks although, in most cases, the disorder lasts for years, with alternating periods of partial or full remission and exacerbation.

A panic attack is the sudden onset of paralyzing fear, terror, or a feeling of impending doom. First attacks can be precipitated by the disruption of important interpersonal relationships, physical illnesses, and major life stresses. Typically, panic attacks last several minutes although they can last for hours. The symptoms of an attack closely resemble those of a heart attack, and people with panic disorder frequently are taken to an emergency room for treatment. Symptoms include:

- accelerated heart beat,
- chest pains,
- dizziness or faintness,
- nausea,
- difficulty breathing or shortness of breath,
- flushes (hot flashes) or chills,
- tingling or numbness in extremities,
- fear of losing control or doing something embarrassing during the attack,
- terror and powerlessness,
- extreme fear of dying.

Many people who have panic disorder also develop agoraphobia *(see above)*. In extreme cases, the fear may be so intense that the individual will be unable to leave home.

Obsessive-Compulsive Disorder

People often are mistakenly described as compulsive if they arrange their room in a meticulous manner or eat the same food at the same restaurant every day. These activities usually are preferred choices.

Obsessive compulsive disorder (OCD), on the other hand, is a serious condition marked by intense anxiety and discomfort. People with OCD attempt to alleviate distress caused by intrusive and persistent thoughts,

ideas, or impulses (obsessions) by performing repetitive but purposeful and intentional behaviors like hand washing (compulsions). An individual may recognize that his or her behavior is excessive or unreasonable and may even attempt to stop the action. Without treatment, however, tension builds again and can only be relieved if the compulsive activity is resumed.

The rituals of OCD can be time-consuming, sometimes taking more than an hour of one's day. People with OCD often develop a phobic avoidance of objects or situations associated with the obsession, such as a person who avoids shaking hands with strangers because of an obsession with contamination. If severe, the illness can impair one's normal routine, occupational functioning, and social relationships.

Other common forms of compulsion do not always match the associated obsessions as clearly. They may include counting, touching, refraining from walking through doorways, rubbing hands through one's hair, or checking endlessly whether the stove has been turned off. There are countless possible forms of obsessions.

Post-Traumatic Stress Disorder

Post-traumatic stress disorder (PTSD) is an anxiety disorder resulting from exposure to terrifying, life-threatening trauma. Common traumas involve serious threats to one's life or to the life of one's child, spouse, close relative or friend. Other traumas include witnessing the death of another person from physical violence or an accident, or witnessing the sudden destruction of one's home or community.

PTSD has been called shell shock, battle fatigue and war neurosis, but the disorder is not limited to soldiers. PTSD affects hundreds of thousands of people who have survived the trauma of:

- natural disasters, such as hurricanes, earthquakes, floods and tornados;
- man-made disasters, such as war, torture, rape and assault; or
- accidental disasters, such as fires, and car and airplane crashes.

Some traumas, such as war and torture, frequently produce PTSD while others, such as car accidents, cause the disorder only occasionally.

PTSD can affect a previously healthy, well-adjusted person by significantly interfering with the person's ability to concentrate, maintain close relationships to family and friends, or function effectively on the job. Often, PTSD can contribute to the development of serious depressive illness and/or alcohol and substance abuse.

In the past, PTSD often was misunderstood and misdiagnosed, but the disorder has very specific symptoms that together form a definite psychological syndrome. Symptoms usually begin immediately or soon after the traumatic event and can persist for years. Symptoms include:

1. re-experiencing traumatic events through
   - vivid and sudden memories (flashbacks) of the stressful event,
   - nightmares centering around the traumatic event, or
   - intense psychological distress upon exposure to events symbolizing or resembling an aspect of the traumatic event, including anniversaries of the event.

2. avoidance of
   - situations, thoughts, and feelings associated with the trauma (victims often experience psychogenic amnesia and are unable to recall important aspects of the event), or
   - taking responsibility for other people.
3. diminished responsiveness, reflected in
   - an inability to express or feel emotions, especially those of love and intimacy toward those to whom they are closest,
   - feelings of detachment and alienation from others,
   - avoidance of close emotional ties with family, colleagues, and friends, or
   - diminished interest in significant activities.
4. increased arousal, such as
   - exaggerated startle response,
   - panic attacks *(see page 21)*,
   - difficulty falling or staying asleep, or
   - difficulty concentrating.

Nearly everyone will experience many of these symptoms after a major trauma; PTSD is diagnosed if the symptoms persist longer than one month.

Depressive Disorders

Depressive disorders, also known as mood disorders or affective disorders, are the second most prevalent form of mental illness in the United States. It is predicted that more than 15 million adults, approximately 8% of people over 18, will have a depressive disorder during their lifetime.

The most common depressive disorders are major depression, manic-depressive illness (also known as bipolar disorder), dysthymia, and seasonal affective disorder (SAD). These conditions are severe and very different from an occasional period of sadness or even a period of intense grief following a loss. Left untreated, symptoms can persist for years, seriously harming a person's health, social relationships, and occupational functioning. In some cases, symptoms of depressive disorders are so severe that they may lead people to suicide. In fact, 15% of people with depression commit suicide, compared to 1% of the general population.

Treatments for depressive disorders have proven very effective. With appropriate treatment, more than 80% of people with such disorders improve substantially.

Major Depression

Approximately 6% of adults in the United States will experience major depression in their lifetime. Most people with major depression lose interest in previously enjoyed activities. Typically, people with major depression express varying degrees of hopelessness.

It is important to distinguish major depression from general sadness or a "bad mood." Depression usually does not subside on its own and, left untreated, can last for long periods. The number and severity of symptoms of depression will vary from individual to individual. For many people, major

depression is episodic and will recur at various times throughout their lives, while others may experience a bout of depression only once.

For some people, major depression may take a mild but persistent course, causing irritability, an inability to concentrate or to make decisions, or overall anxiety. For others, the depression takes a much more serious form; an individual experiences extremely low self-esteem, withdraws socially, or literally may be unable to get out of bed. Some people with depression also have persistent thoughts of suicide.

Fortunately, signs and symptoms of major depression are recognizable and treatable. The most common symptoms of major depression include:

- persistent "emptiness" or intense sadness,
- pessimism,
- feelings of worthlessness or helplessness,
- loss of pleasure in ordinary activities,
- problems with sleep (insomnia, early morning waking, oversleeping),
- decreased energy or fatigue,
- loss of appetite or overeating,
- irritability and restlessness; anger out of proportion to the situation,
- difficulty concentrating, remembering, and making decisions, inappropriate guilt
- social withdrawal,
- marked personality change,
- headache or chronic pain that doesn't respond to treatment,
- recurrent thoughts of death or suicide.

In cases of life-threatening depression or when an individual has not responded to other treatment, electroconvulsive therapy (ECT) is sometimes used as an alternative treatment.

Manic Depressive Illness (Bipolar Disorder)

More than 1.5 million adults in the United States will experience manic-depressive illness at some time during their lives. People with manic-depression, also known as bipolar disorder, will experience episodes of mania ("highs") and depression ("lows"). The intensity and duration of these episodes, as well as the overall pattern of the illness, vary from person to person. For instance, some people may go directly from a depressive episode into a manic episode, while others will have periods of recovery in between. Most often, mood swings are gradual, although they can be dramatic and rapid.

During a depressive episode, a person will have some or all the symptoms associated with major depression *(see page 23)*. At a later time, the same individual will experience some or all symptoms of the manic phase of the illness, such as:

- elated, euphoric mood,
- abundant energy and activity,
- grandiose notions, unrealistic belief in one's abilities,

- racing thoughts; rushes of ideas,
- extreme irritability and distractibility,
- insomnia or decreased need for sleep,
- dramatically increased talking, moving, fidgeting,
- increased risk taking,
- tendency to overlook painful or harmful consequences of behavior.

Mania is not simply a "good" mood; it is a state of euphoria that is excessive, with significant impairment of occupational and social functioning. Treatment for manic-depression has proven extremely effective. Many people function for long periods without a recurrence of the illness.

Dysthynua

More than 3% of adults will experience dysthymia at some point during their lives. People diagnosed with dysthymia have experienced symptoms similar to major depression for two years or more. Although the symptoms are not as severe as those associated with major depression, people with dysthymia do not function as well as they would like. Symptoms may include low-grade anxiety many days of the year, difficulty concentrating and making decisions, insomnia or oversleeping, disturbances in eating habits, and a lack of energy.

While there may be only mild impairment of occupational and social functioning, in most cases of dysthymia complications occur because of the illness' chronicity. Some people develop double depression, the occurrence of major depression on top of the dysthymia.

Seasonal Affective Disorder

Seasonal affective disorder (SAD), a form of depression that regularly occurs during winter months, has been linked to melatonin, a sleep-related hormone that the pineal gland produces and releases in the dark. During the winter's shorter, darker days, the body's production of melatonin is particularly active.

A person with SAD develops symptoms in the winter and experiences remission in the spring. Symptoms include:

- regularly occurring symptoms of major depression in the late fall or winter months *(see page 23)*,
- at least three times as many instances of depression within a two-month time frame as during other times of the year,
- excessive eating, sleeping, weight gain,
- the absence of other factors that could account for seasonally recurring mood changes (e.g., spouse leaving on business or being unemployed every winter).

In 1980, researchers discovered that very bright light blocks the release of melatonin and relieves winter depression. Because of these findings, phototherapy, or exposure to a full spectrum light source (that excludes UV rays), has been used widely to treat SAD.

SCHIZOPHRENIA

Approximately 3 million people will experience schizophrenia during their lifetime (nearly 2% of adults), most of whom will develop the initial symptoms between the ages of 15 and 25. Typically, the illness is characterized by dissociated or fragmented thoughts and an inability to process information. Research has not yet determined whether schizophrenia is a single disorder or a group of related illnesses. The illness is highly complex and few generalizations hold true for all people diagnosed with schizophrenia. Schizophrenia is not the same as multiple personality, a separate and rare disorder.

Symptoms of schizophrenia have been categorized as either "negative" or "positive." These words do not imply a value judgment; rather, they are part of the medical language used to describe the symptoms. Negative symptoms include:

- social isolation or withdrawal,
- flat or inappropriate affect,
- loss of drive or motivation,
- lack of communication,
- impaired social relationships,
- impairment in grooming and personal hygiene.

Positive symptoms (often referred to as psychosis) include:

- hallucinations – hearing, feeling or seeing things that do not actually exist. Auditory hallucinations, such as voices that persistently comment on the person's actions, are the most common.
- delusions – false personal beliefs that can not be corrected by reason. Delusions may involve feelings of being controlled or persecuted, or may be grandiose in nature. A delusion of grandeur involves an exaggerated sense of one's importance, power, or knowledge.
- thought disorder – an inability to "think straight." People might jump from topic to topic, or might be unable to sort out what is relevant or irrelevant to a given situation. Thoughts may be disorganized, conveying little or no information at all. People also may exhibit "loosening of associations," which is characterized by speech that is digressive, vague, overelaborate or lacking information.

Medications are helpful in reducing the positive symptoms in a majority of people with schizophrenia. Unfortunately, some people also experience side effects from medications, such as "dry mouth," drowsiness or tardive dyskinesia (TD). TD is characterized by involuntary movements, most often around the mouth, lips, and tongue.

Suggested References

American Association of University Professors. *AAUP Policy Documents and Reports*. (AAUP, 1990).

Casey, John M. "From Agoraphobia to Xenophobia: Phobias and Other Anxiety Disorders Under the Americans With Disabilities Act," 17 *University of Puget Sound Law Review* 351 (1994).

Crow, Stephen M. "Excessive Absenteeism and the Disabilities Act," *Arbitration Journal* 65 (March 1993).

Edwards, Margaret H. "The ADA and the Employment of Individuals with Mental Disabilities," 18 *Employee Relations Law Journal* 347 (1992-3).

Equal Employment Opportunity Commission. *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*. EEOC Notice Number 915.002 (March 25, 1997).

Equal Employment Opportunity Commission. *EEOC Guidance on the Effect of Representations made in Application for Benefits on the Determination of Whether a Person is a "Qualified Individual with a Disability" under the ADA*. EEOC Notice Number 915.002 (February 12, 1997)

Fielder, John F. *Mental Disabilities and the Americans with Disabilities Act: A Concise Compliance Manual for Executives*. Westport, Ct.: Quorum Books, 1994.

Gates, Lauren B. "The Role of the Supervisor in Successful Adjustment to Work with a Disabling Condition: Issues for Disability Policy and Practice," 3 *Journal of Occupational Rehabilitation* 179 (1993).

Goldberg, Janet E., "Employees with Mental and Emotional Problems – Workplace Security and Implications of State Discrimination Laws, the Americans With Disabilities Act, the Rehabilitation Act, Workers' Compensation and Related Issues," 24 *Stetson L. Rev.* 201 (1994).

Haggard, Loretta K. "Reasonable Accommodation of Individuals with Mental Disabilities and Psychoactive Substance Use Disorders Under Title I of the Americans With Disabilities Act," 43 *Washington University Journal of Urban and Contemporary Law* 343 (1993).

Hamilton, Janet L. "New Protections for Persons with Mental Illness in the Workplace under the Americans with Disabilities Act of 1990," 40 *Cleveland State Law Review* 63 (1992).

Kahn, Jeffrey A. *Mental Health in the Workplace: A Practical Psychiatric Guide*. New York: Van Nostrand Reinhold, 1993.

Kaufman, Caroline L. "Reasonable Accommodation to Mental Health Disabilities at Work: Legal Constructs and Practical Applications," 21 *Journal of Psychiatry and Law* 153 (1993).

Kemp, Donna R. *Mental Health in the Workplace: The Employer's and Manager's Guide*. Westport, Ct: Quorum Books, 1994.

Lee, Barbara A. and Karen Newman. "Employer Responses to Disability: Preliminary Evidence and a Research Agenda," 8 *Employee Responsibilities and Rights Journal* 209 (1995)

Mancuso, Laura. *Case Studies on Reasonable Accommodations for Workers with Psychiatric Disabilities*. Sacramento: California Dept. of Mental Health, 1993.

Mancuso, Laura. "Reasonable Accommodation for Workers with Psychiatric Disabilities," 14 *Psychosocial Rehabilitation Journal* 3 (1990).

Mickey, Paul F., Jr. and Maryelena Pardo, "Dealing with Mental Disabilities under the ADA." 9 *The Labor Lawyer* 531 (1993).

Parrish, Jacqueline. "Reasonable Accommodations for People with Psychiatric Disabilities," 8 *Community Support Network News* 8 (1991).

Parry, John W. "Mental Disabilities Under the ADA: A Difficult Path to Follow," 17 *Mental and Physical Disability Law Reporter* 100 (1993).

U.S. Office of Technology Assessment, *Psychiatric Disabilities, Employment, and the Americans with Disabilities Act*. Washington, DC: U.S. Government Printing Office, 1994.

Vennochi, Joan. "When Depression Comes to Work," *Working Woman* 43 (August 1995).

Zuckerman, Deborah. "Reasonable Accommodations for People with Mental Illness under the ADA," 17 *Mental and Physical Disability Law Reporter* 311 (1993).

Zuckerman, Deborah, Kathleen Debenham, and Kenneth Moore. *The ADA and People with Mental Illness: A Resource Manual for Employers*. Washington, DC: American Bar Association and the National Mental Health Association, 1993.

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